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UNITED STATES DISTRICT COURT
 WESTERN DISTRICT OF WASHINGTON
 AT SEATTLE

REBECCA HUGHES, et al.,)

NO. C98-1646C

Plaintiffs,)

v.)

MICROSOFT CORPORATION, et al.,)

Defendants.)

DONNA VIZCAINO, et al.,)

NO. C93-0178C ✓

Plaintiffs,)

v.)

MICROSOFT CORPORATION, et al.,)

FINDINGS OF FACT
 AND CONCLUSIONS OF LAW

Defendants.)

These matters come before the Court on the parties' motion for approval of the December 8, 2000 Class Action Settlement Agreement (the "Settlement Agreement" or "S.A."). The Court, having considered the papers submitted by the parties and the oral argument pertinent hereto, hereby finds and rules as follows.

I. INTRODUCTION

FINDINGS OF FACT AND CONCLUSIONS OF LAW -

1 On December 12, 2000 and January 10, 2001, this Court entered orders (the "Preliminary
2 Approval Orders") preliminarily approving the terms of the proposed settlement in *Vizcaino v.*
3 *Microsoft*, No. C93-0178C, a certified class action, and *Hughes v. Microsoft*, No. C98-1646C, a
4 putative class action. In the Preliminary Approval Orders, the Court also preliminarily approved
5 class counsel's fee request.

6 As part of the Preliminary Approval Orders, this Court scheduled a hearing at which class
7 members who objected to the settlement could be heard. Proper notice of the settlement and
8 fairness hearing was provided to the class. Information concerning the identity of these individuals
9 was gathered from the records of temporary employment agencies, Microsoft's records, and
10 information forms submitted by class members to class counsel.

11 The notice to the class, which included notice of the fairness hearing, notice regarding class
12 member rights to exclude themselves from the case, and notice regarding the submission of
13 objections, was mailed to approximately 37,155 individuals who performed assignments for
14 Microsoft between December 1986 and June 30, 2000, and who were paid as independent
15 contractors or by third-party temporary employment agencies. Approximately 5,773 of the notices
16 were undeliverable.

17 A summary notice was also published in *The Seattle Times* and *The Seattle Post*
18 *Intelligencer* on December 29, 2000, and January 16, 2000; in *The San Francisco Examiner* on
19 December 29, 2000, and January 5, 2001; and in *The News Tribune* on December 29, 2000, and
20 January 6, 2001. News of the settlement also received nationwide and even worldwide media and
21 Internet coverage.

22 In addition, the notice and the Settlement Agreement were published on class counsel's
23 website (www.bs-s.com). The site received over 21,000 user sessions between December 12, 2000,
24 when the notice and settlement agreement were posted, and February 8, 2001.

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26 2

1 The notice to class members was the best notice practicable and complied with the
2 Preliminary Approval Orders, Federal Rule of Civil Procedure 23, and due process. *See Silber v.*
3 *Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994).

4 On February 27, 2001, the Court conducted a hearing to determine the fairness,
5 reasonableness, and adequacy of the settlement. The Court, having considered the submissions and
6 arguments of the parties and the proponents and opponents to the settlement, as well as the
7 proceedings in this litigation, hereby GRANTS final approval of the settlement pursuant to Federal
8 Rule of Civil Procedure 23(e). In support of this conclusion, the Court makes the following
9 findings of fact and conclusions of law.

10 **II. HISTORY OF THE LITIGATION**

11 The two cases resolved by this Settlement Agreement have a protracted history that,
12 including pre-filing administrative procedures, extends almost twelve years. Between 1987 and
13 1990, Microsoft supplemented its employee work force with workers known as "freelancers," who
14 agreed with Microsoft in writing that they would not be eligible for Microsoft employee benefits.
15 Those benefits included the Employee Stock Purchase Plan ("ESPP"), a plan governed by
16 Washington state law that allows regular employees to purchase Microsoft stock at a discount, and
17 the Savings Plus Plan ("SPP"), a "401(k)" plan governed by the Employee Retirement Income
18 Security Act of 1974, 29 U.S.C. § 1001 et seq.

19 In 1989, after evaluating the work done by, and the working conditions of, certain
20 freelancers, the IRS took the position that, for federal employment tax purposes, some of the
21 freelancers qualified as employees of Microsoft under the IRS's rules. Microsoft resolved the
22 matter with the IRS.

23 In 1992, eight former freelancers brought the *Vizcaino* action, challenging Microsoft's
24 refusal to provide them with benefits under the ESPP, the SPP, and other benefit programs such as

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1 Microsoft's health plan, its short and long-term disability plans, and with paid vacation, holiday,
2 and sick time. The class representatives in *Vizcaino* are Donna Vizcaino, Jon Waite, Mark Stout,
3 Geoffrey Culbert, Lesley Stuart, Thomas Morgan, Elizabeth Spokoiny, and Larry Spokoiny (the
4 "*Vizcaino* Named Plaintiffs"). In 1993, District Court Judge Carolyn Dimmick certified a class
5 composed of "[a]ll persons employed by the Microsoft Corporation in the United States who are
6 denied employee benefits because they are considered independent contractors or employees of
7 third-party employment agencies, but who meet the definition of employees of Microsoft
8 Corporation under the common law." *Vizcaino v. Microsoft Corp.*, Docket No. 47, at 13 (W.D.
9 Wash. July 21, 1993).

10 Following the 1993 certification of the class, Judge Dimmick granted Microsoft's motions
11 for summary judgment and dismissed each of plaintiffs' claims. *Vizcaino v. Microsoft Corp.*,
12 Docket Nos. 223 and 225 (W.D. Wash. June 20, 1994 and July 6, 1994). Plaintiffs appealed Judge
13 Dimmick's summary judgment ruling with respect to the ESPP and SPP benefits, but did not
14 challenge the dismissal of their claims to other employment benefits.

15 In 1996, a panel of the Ninth Circuit reversed the Judge Dimmick's ruling as to the ESPP
16 and SPP benefits. *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1996). The Ninth Circuit
17 granted Microsoft's petition for rehearing, and, in 1997, the Ninth Circuit en banc issued a decision
18 reversing Judge Dimmick's denial of plaintiffs' claims for ESPP benefits. The Ninth Circuit
19 directed Judge Dimmick to resolve on remand "[a]ny remaining issues regarding the rights of a
20 particular worker in the ESPP and his available remedies." *Vizcaino v. Microsoft Corp.*, 120 F.3d
21 1006, 1015 (9th Cir. 1997), *cert. denied*, 522 U.S. 1098 (1998). The Ninth Circuit ordered Judge
22 Dimmick to remand plaintiffs' claims for SPP benefits to the plan administrator for review.

23 The ESPP permits eligible employees to purchase Microsoft stock at a discounted price
24 during offering periods commencing January 1 and July 1 of each year. Eligible employees enroll

1 in the ESPP by authorizing a payroll deduction of 2%, 4%, 6%, 8%, or 10% of their base pay,
2 which is paid into the ESPP during each offering period. At the end of each offering period,
3 Microsoft issues to each participant the number of whole shares that can be purchased with the
4 participant's payroll deductions, at a discount price. The ESPP discount price is 85% of the market
5 price on the first or the last day of each offering period, whichever is lowest. Alternatively, a
6 participant may, at any time before the end of the offering period, elect to purchase no shares and
7 have the full payroll deduction returned, without interest. Individuals who fail to work through the
8 end of an ESPP offering period have their deferrals returned in cash and receive no stock in that
9 period.

10 Judge Dimmick ruled that the measure of damages for the class members' ESPP claims
11 should be based on the assumption that eligible individuals received stock at the discounted price in
12 each offering period and held it for one year. *Vizcaino v. Microsoft Corp.*, Docket No. 510 (W.D.
13 Wash. October 5, 1998). The Court assumed that an average participation rate of eligible
14 employees would be used to determine the amount assumed to be invested through the ESPP, for
15 purposes of applying a damages measure. Pending but unresolved as of the date of the Settlement
16 Agreement was Microsoft's motion seeking reconsideration of Judge Dimmick's damages measure,
17 as well as its alternative motion for partial summary judgment concerning the interpretation of the
18 measure established in Judge Dimmick's earlier order.

19 Following the Ninth Circuit's 1997 remand, the SPP administrator denied the class
20 members' claims for SPP eligibility. (2/22/01 First Monaco Decl., Ex. 2.) The class members
21 appealed to the plan's administrative committee, which denied the appeal in a determination
22 finalized on October 1, 1999. (2/22/01 First Monaco Decl., Ex. 3.) The issue therefore became
23 ready for judicial review by the Court, but it had not been argued or decided at the time of the
24 settlement.

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1 After the 1997 remand, Judge Dimmick held that the *Vizcaino* class included only certain
2 individuals who had performed assignments for Microsoft before 1990. In response, the *Vizcaino*
3 Plaintiffs filed several motions and a petition for a writ of mandamus in the Ninth Circuit. In
4 addition, the *Hughes* case was filed. *Hughes* is a putative class action whose members include
5 individuals who performed assignments for Microsoft after 1990. The plaintiffs in the *Hughes* case
6 are Rebecca Hughes, Karen Jacobsen, Anita Zuidweg, Michael Schramm, Roberta Wilson, John
7 Schussler, Richard Pauli, Jim Emerson, Steven Fulgham and Mehdi J. Beygi (the "*Hughes* Named
8 Plaintiffs"). *Hughes* was filed as a protective measure, brought on behalf of persons whom
9 plaintiffs' counsel asserted should be in the *Vizcaino* class but, by the terms of the District Court's
10 Orders, were not. By agreement of the parties and with the approval of the Court, *Hughes* has been
11 largely inactive since its initiation, in view of *Vizcaino III* and later due to settlement discussions.

12 The Ninth Circuit granted the mandamus petition, held that the *Vizcaino* class includes
13 individuals who performed assignments for Microsoft after 1990, and described factors to be
14 applied to determine whether individuals paid through temporary employment agencies were
15 potentially eligible to participate in the ESPP. *Vizcaino v. United States Dist. Court*, 173 F.3d 713
16 (9th Cir. 1999), *amended by* 184 F.3d 1070 (9th Cir. 1999) (*Vizcaino III*), *cert. denied*, 528 U.S.
17 1105 (2000). As a result of the Ninth Circuit's decision, all of the members of the class sought to
18 be represented by the *Hughes* Plaintiffs are members of the *Vizcaino* class as defined in *Vizcaino*
19 *III*.

20 Over a two-year period, the parties had numerous face-to-face meetings, and several
21 mediation sessions with the Honorable George Finkle of Judicial Dispute Resolution, in order to
22 explore settlement of this action. During that period, the parties exchanged and analyzed data
23 pertinent to analysis and development of damages estimates. Mediation efforts before Judge Finkle
24 were not successful. This Court then ordered the parties to engage in settlement discussions with

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1 the Honorable William L. Dwyer, whom this Court appointed as settlement judge. After two days
2 of negotiation and building on the data developed during mediation, Judge Dwyer recommended
3 the framework of the settlement and the amount of \$96.885 million as a fair and reasonable
4 compromise.

5 Following the meetings with Judge Dwyer, the parties negotiated the particulars of the
6 settlement. On December 8, 2000, the parties submitted to the Court the Settlement Agreement,
7 which was based on Judge Dwyer's recommendations. This Court preliminarily approved the
8 settlement on December 12, 2000.

9 Throughout the course of this litigation, the defendants disputed the claims and denied that
10 the plaintiffs were entitled to any relief. The proposed settlement is a result of compromise and
11 neither party concedes that the other party's position is meritorious. The defendants believe the
12 amount of \$96.885 million is substantially greater than warranted by the claims.

13 **III. NATURE OF THE RELIEF TO THE CLASS**

14 Subject to the terms of the settlement, Microsoft will deposit \$96.885 million into a
15 Settlement Fund. After deducting payments such as incentive awards to the representative
16 plaintiffs, a fee to class counsel, and the costs of settlement and claims administration, the balance
17 will be distributed to eligible class members.

18 In order to be eligible to take under the Settlement Agreement, a person must have worked
19 for Microsoft for nine months and worked for 750 hours or more during each six-month offering
20 period between January 1, 1987 and June 30, 2000. Regarding the nine-month eligibility threshold,
21 the parties recognized that (1) short-term workers do not typically meet the test for common law
22 employment; (2) a factual analysis of whether a particular short-term worker was or was not a
23 common law employee would be extraordinarily time consuming and expensive to determine
24 (indeed, the expense and difficulty of making such determinations were part of the impetus for

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1 settling the cases); and (3) a precise line regarding factors relevant to common law employee status,
2 the crux of class membership, is difficult to draw. Accordingly, the parties compromised at nine
3 months.

4 Eligibility also requires that the class members worked 750 hours or more in each "Eligible
5 Period," i.e., each six-month offering period between January 1, 1987 and June 30, 2000. The 750-
6 hour requirement is also a reasonable compromise. Because class members were not paid for sick
7 days and holidays, in effect they worked fewer than the 1,040 hours worked by full-time
8 employees. The 750 hours per eligibility period thus takes into account unpaid days off.

9 Distribution to each qualifying class member is based on a payment formula. For offering
10 periods before 1999, the payment formula is based on the valuation measure in Judge Dimmick's
11 October 5, 1998 order. For offering periods before 1999, the payment formula is based on the
12 following components: the average participation rate in the ESPP by Microsoft employees, the
13 historical average compensation of \$27,000 per offering period, the price on the NASDAQ of
14 Microsoft shares during the offering period less the 15% discount, a holding period of one year
15 (including any stock splits in that year), and interest at 12% per annum thereafter. The payment
16 formula is described more fully in the Settlement Agreement.

17 For offering periods beginning January 1, 1999 through June 30, 2000, the payment formula
18 is adjusted slightly to avoid the adverse effect on class members of post-1999 changes in the price
19 of Microsoft stock. This compromise is reasonable given the uncertainties regarding the proper
20 manner in which to measure the appropriate damages for plaintiffs' ESPP claims.

21 After 1997, Microsoft made important changes in its staffing and worker classification
22 practices. In the fiscal year beginning July 1, 1999, Microsoft hired over 3,000 class members as
23 W-2 employees entitled to participate in its employee benefit plans and programs. Microsoft has
24 adopted practices to ensure the proper classification of independent contractors, temporary agency

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1 employees, and other staff, including a comprehensive review of practices regarding independent
2 contractor classifications which took place in 1997. It has conducted reviews of ongoing work and
3 has instituted practices designed to limit the length of temporary agency employees' assignments
4 for Microsoft to ensure that those classified as temporary employees are in fact classified correctly.
5 In view of Microsoft's current practices and policies, declaratory or injunctive relief is neither
6 necessary nor appropriate as part of the settlement, and the Settlement Agreement therefore does
7 not include any provision restricting or imposing conditions on Microsoft's future policies or
8 practices. As set out in the Settlement Agreement, nothing in that agreement constitutes an express
9 or implied contract with regard to Microsoft's future policies or practices.

10 The Court finds that all of the eligibility criteria and the formulae for distribution of the
11 Settlement Fund are fair and reasonable. In particular, the eligibility criteria that the settlement
12 uses to approximate common law employee status are fair and reasonable. *See Nationwide Mut.*
13 *Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (listing the duration of the relationship between the
14 parties as an incident of common law employee status); *Restatement (Second) of Agency* § 220
15 (1958) (listing "the length of time for which the person is employed" as a factor relevant to the
16 issue of employee status). By using these objective criteria, the settlement obviates the need for
17 extended and burdensome litigation regarding the particulars of individuals' assignments at
18 Microsoft, thereby achieving greater uniformity and hastening the time for payment. Washington
19 state courts adjudicating class action disputes of this kind have endorsed this mechanism of
20 approximating common law employee status as being in accord with Washington state law. *See,*
21 *e.g.*, Class Action Settlement Agreement, *Clark v. King County*, No. 95-2-29890-7 SEA, at 2, 23
22 (Wash. Super. Ct. June 7, 2000) (class action settlement agreement).

23 **IV. THE FAIRNESS AND REASONABLENESS OF THE SETTLEMENT**

24 There is a strong judicial policy favoring settlement of class actions. *Class Plaintiffs v. City*

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1 of *Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). The Ninth Circuit has set forth seven factors
2 courts are to consider when determining whether a proposed settlement is fair, adequate and
3 reasonable. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454 (9th Cir. 2000). These factors are
4 (1) the lack of fraud or collusion behind the settlement; (2) the risk, complexity, expense and likely
5 duration of the litigation; (3) the stage of the proceedings and the extent of discovery; (4) the
6 adequacy of the proposal; (5) the experience and views of class counsel; (6) the strength of the
7 remaining claims and damages; and (7) the reaction of class members to the proposed settlement.
8 *Id.*

9 **A. Lack of Fraud or Collusion**

10 In addition to the fact that the settlement was mediated with the assistance of the Honorable
11 William L. Dwyer, the duration, intensity, and extent of the litigation demonstrate the non-
12 collusive nature of the settlement. Judge Dwyer's recommendation that the settlement is fair and
13 reasonable supports a finding that the settlement is in fact in the best interests of the class members.
14 *See In re Pacific Sec. Enters. Litig. (Principe v. Ukropina)*, 47 F.3d 373, 378 (9th Cir. 1995).
15 Furthermore, the Court has seen no evidence, and there has been no suggestion, that fraud or
16 collusion played any part in the settlement. The Court therefore finds that this factor weighs in
17 favor of approving the settlement as fair, adequate, and reasonable.

18 **B. Risk, Complexity, Expense, and Likely Duration of the Litigation**

19 The Court finds that the risk, complexity, expense, and duration of this litigation weigh in
20 favor of the fairness and reasonableness of the settlement. The entire case was extremely risky and
21 of great magnitude and complexity and defendants' opposition throughout has been vigorous.
22 Other cases involving similar facts have been decided against the plaintiffs' position. There were
23 no precedents supporting the plaintiffs' claims at the time the action was filed and there were no
24 cases certifying a class of alleged common law employees who were considered "independent

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1 contractors” or workers paid through third-party agencies at the time the action was filed. Not only
2 that, but plaintiffs had even signed documents agreeing that they were not entitled to benefits. The
3 legal issues were novel, complex, difficult, and vigorously contested. Thus, because of the still
4 outstanding unresolved matters, major factual disputes, and unresolved damages issues in the
5 litigation, a reasonable compromise is in the interests of the class.

6 This litigation, not including the initial administrative proceedings, has a protracted, eight-
7 year history. The Ninth Circuit has already reviewed this case three times, and the defendants
8 twice petitioned for a writ of certiorari to the United States Supreme Court. Numerous amici
9 submitted briefs in the appellate courts and in this Court, on both sides. In addition to the matters
10 still pending before this Court, it is likely that there would be two to three additional years of
11 appellate proceedings if this matter proceeded to a final judgment. Thus, the potential further delay
12 here would be considerable. The Court finds that the complexity of the issues, the risk of
13 continued litigation, and the probability of substantial further delay support the reasonableness of
14 the proposed settlement.

15 **C. The Stage of the Proceedings and the Extent of Discovery**

16 The record reflects that there has been substantial discovery in this case and that class
17 counsel had the assistance of a computer consultant and economics expert to evaluate the evidence
18 and assess the value of the potential recovery. However, very substantial discovery would still
19 have to occur if the case were to proceed to trial.

20 **D. The Adequacy of the Proposed Settlement**

21 Recovery under the settlement is dependent upon principles of common law employee
22 status. A large number of individuals, estimated at over 10,000, are expected to obtain monetary
23 relief. However, many—indeed the majority—of class members are expected to receive no
24 recovery under the settlement, mainly because they were short term workers. Moreover, the

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1 amounts of recovery will differ among class members. However, these differences are permissible
2 because they are based on the differing circumstances of the class members' individual claims.
3 *See, e.g., Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1377-78 (9th Cir. 1993) (approving
4 disparate treatment of class members that is based on the facts of the case and is not "irrational").
5 The Court finds that the settlement is adequate, thus supporting approval of the Settlement
6 Agreement.

7 **E. Views of Class Counsel**

8 Class counsel support approval of the proposed settlement. In determining whether to
9 approve a settlement, the Court keeps in mind the unique ability of class counsel to assess potential
10 risks and rewards of litigation. "A presumption of correctness is said to attach to a class settlement
11 reached in arms-length negotiations between experienced capable counsel after meaningful
12 discovery." *Manual for Complex Litigation (Third)* § 30.42 (1995).

13 Here, class counsel are experienced class action litigators whose practice in the area of
14 employee rights and benefits spans over twenty years. Class counsel have an "outstanding
15 reputation . . . in the employment law national legal community." (Tobias Aff., ¶12.) In addition,
16 the Court is familiar with the quality and thoroughness of class counsel's work through materials
17 presented to the Court. Class counsel's opinion is accorded considerable weight and supports the
18 fairness and adequacy of the proposed settlement.

19 **F. Strength of the Remaining Claims and Damages**

20 Although plaintiffs achieved substantial success on their ESPP claim, pending was
21 defendants' motion for reconsideration concerning the valuation of that claim. Had that motion
22 been granted, the value of plaintiffs' ESPP claims would have been substantially less than the value
23 under Judge Dinmick's formula. Plaintiffs' SPP claim was not resolved, but was rejected on
24 remand to the plan administrator. Still unresolved was the identification of individuals or groups of

1 individuals who are within the definition of common law employee, and that process would have
2 been expensive and time-consuming, with an uncertain outcome with respect to persons who were
3 actually entitled to recover. The Court finds that these considerations support approval of the
4 proposed settlement.

5 **G. Reaction of Class Members**

6 **1. Opt-outs**

7 The proposed Settlement Agreement afforded those individuals who did not wish to
8 participate in the settlement, and who did not wish to be included in the class, the opportunity to
9 opt-out. Eighty-six individuals submitted valid timely requests to be excluded from the case and
10 the settlement. Approximately half of them stated that they excluded themselves because they did
11 not agree with the litigation or they had very short time periods working for Microsoft. These
12 eighty-six individuals, whose identities are set forth in Annex A of this order, are hereby excluded
13 from the litigation and excluded from receiving any relief in this settlement.

14 As of the opt-out deadline of January 26, 2001, the settlement administrator had received 21
15 opt-out forms that were defective because, contrary to the requirements of the Preliminary
16 Approval Orders (which were set forth in the notices sent to class members), they either were not
17 signed, were not dated, or did not include a certification under penalty of perjury or notarization.
18 The Court finds that the requirement that opt-outs be signed, notarized, and dated are reasonable
19 measures to protect against fraud. In addition, the settlement administrator has received late opt-
20 out forms.

21 The Court finds that the procedures for opting out from the class were plainly set forth in
22 the notice of the settlement and were not difficult to follow. Moreover, given the publication of the
23 notice of the settlement and the wide-spread news coverage of the settlement (2/22/01 Second
24 Monaco Decl., Exs. 1-103), class members who did not receive individual notice of the settlement

1 should nonetheless have become aware of the settlement and the means of opting out of the class
2 had they been diligently monitoring their rights. Because Microsoft had the right to withdraw from
3 the settlement if a certain percentage of class members opted out (S.A. ¶¶ 121-22), Microsoft was
4 entitled to know the number of opt-outs. Accordingly, the Court declares that only those class
5 members set forth in Annex A are excluded from the class.

6 **2. Class Member Approval**

7 The Court finds that the class members overwhelmingly support the settlement. Over
8 37,000 notices were sent and over 3,600 class members contacted class counsel wanting to
9 participate. After the settlement was announced, 2,745 class members (some of whom had
10 previously contacted class counsel) wrote to class counsel wanting the benefits of the settlement.
11 They did not object to the adequacy of the settlement, the amount of the incentive awards to the
12 representative plaintiffs, nor to class counsel's fee request. Many class members also wrote to class
13 counsel affirmatively supporting all aspects of the settlement. As already discussed, less than 1%
14 of the class opted out and only nine objections were submitted. In view of the widespread publicity
15 about the settlement, these indicia of the approval of the class of the terms of the settlement support
16 a finding of fairness under Rule 23. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir.
17 1998); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977).

18 **3. Objections**

19 Only nine objections to the settlement were filed, either individually or in a group. At the
20 fairness hearing on February 27, 2001, appearances were made on behalf of only two of the
21 objections.

22 **a. The Hatfield Objectors**

23 Counsel for one group of objectors (Danny Hatfield, Thomas Morgan, Stephen Oringdolph,
24 Lesley Stuart, Donna Vizcaino, and Felicity Wilson, collectively the "Hatfield Objectors")

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1 appeared and stated that they did not object to the overall amount of the settlement, but objected to
2 class counsel's fee request¹ and questioned some aspects of the operation of the Settlement
3 Agreement. At the Court's request, in response to the questions regarding operation of the
4 agreement, class counsel and defendants' counsel agreed to make amendments and clarifications to
5 the Settlement Agreement. The agreed modifications are as follows: (1) Notice will be provided, in
6 connection with the claim administration process, that class members who disagree with the
7 Settlement Administrator's determinations may petition this Court for a review of those
8 determinations (*see* S.A. ¶ 95), and the Court shall retain jurisdiction over *Vizcaino* and *Hughes* in
9 order to adjudicate such disputes and set schedules, including cut-off dates, for class members to
10 challenge the Settlement Administrator's decisions; (2) copies of the Settlement Administrator's
11 proposed plan of distribution will be provided to the class representatives, with sensitive and
12 identifying information removed (*see* S.A. ¶ 100); (3) the parties will not further amend the
13 Settlement Agreement unless the Court approves such amendments following written motion, and
14 notice of such a motion will be posted on class counsel's web site (*see* S.A. ¶ 116); (4) class
15 counsel will provide notice to the class representatives regarding the selection of a charitable entity
16 that will receive any unclaimed funds from the Settlement Fund (*see* S.A. ¶ 104); (5) 75% of the
17 attorney fee award to be distributed to class counsel will be disbursed from the Fund within
18 fourteen days following the Effective Date, and the remaining 25% will be disbursed upon Court
19 approval of the Final Report (*see* S.A. ¶¶ 76, 106). The Hatfield Objectors agreed, through
20 counsel, that these modifications to, and clarifications of, the Settlement Agreement satisfied their
21 concerns. The Hatfield Objectors also raised questions regarding the incentive fee awards to the
22

23 ¹ The Court will address the fee award requested by class counsel and the objections to that
24 award in a subsequent order, after class counsel provide a supplemental pleading containing more
25 detailed time record information and objectors have a chance to respond, as ordered at the fairness
26 hearing.

1 named plaintiffs; those concerns are addressed *infra*.

2 **b. Robert Percival**

3 Robert Percival, who was the only objector besides the Hatfield Objectors to make an
4 appearance at the fairness hearing, stated at the fairness hearing that he agreed with the overall
5 amount of the settlement agreement, but asked the Court to modify the Settlement Agreement to
6 establish the number of his Eligible Periods under the Settlement Agreement. The Court rejected
7 Mr. Percival's suggestion that the Settlement Agreement make specific provision for him. The
8 Court explained that the Settlement Agreement vests the Settlement Administrator with the
9 responsibility of making eligibility determinations for all class members and if Mr. Percival
10 disagrees with the Settlement Administrator's decision regarding his eligibility, he has the right to
11 petition this Court for review of that decision.

12 **c. Oli Glenn**

13 Oli P. Glenn, who did not appear at the hearing, urges that the settlement is unfair because it
14 does not provide payouts to workers like him who worked for less than nine months. He also
15 requests that the Court "[i]ncrease the amount of money to settle the case." (1/16/01 Glenn Obj. at
16 2.) As already discussed, the settlement criterion of nine months' service approximates common
17 law employee status in a manner that Washington's courts have approved in similar class action
18 settlements. Moreover, such a criterion has the effect of avoiding the delay, uncertainties, and
19 expense that would occur if the parties tried the issue of each class member's common law
20 employment status. Nine months' service represents a reasonable compromise that is fair and in
21 accordance with applicable law.

22 Mr. Glenn also asserts his belief that the amount of the settlement is insufficient. He
23 provides no description of any of the provisions of the settlement with which he takes issue. An
24 objection that the settlement "could have been better . . . does not mean the settlement presented

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1 [is] not fair, reasonable or adequate.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir.
2 1998). Because “[s]ettlement is the offspring of compromise” the appropriate inquiry for a court
3 reviewing a settlement pursuant to Rule 23(e) is “not whether the final product could be prettier,
4 smarter or snazzier, but whether it is fair, adequate and free from collusion.” *Id.* As discussed
5 above, the Court finds that the overall amount of the settlement is fair and reasonable.

6 Mr. Glenn’s objection also makes reference to the fact that members of the class did not
7 receive medical benefits from Microsoft on account of their assignments for Microsoft. However,
8 the class’s claims in *Vizcaino* for benefits other than their ESPP and SPP benefits were dismissed
9 by this Court in 1994, and that dismissal was not appealed. Such claims are therefore not a proper
10 basis for settlement. Finally, the Court notes that, if the factual assertions in his objection are
11 accurate, Mr. Glenn would not have been qualified to participate in the ESPP even if he had been
12 considered a common law employee by Microsoft during the limited duration of his assignment.
13 The ESPP requires participants to be employed on both the first and the last day of one of the six
14 month offering periods in order to make an ESPP purchase. However, Mr. Glenn states that he
15 worked on assignment at Microsoft for only five months. The Court concludes that Mr. Glenn’s
16 objections do not support a finding that the settlement is unreasonable or otherwise deficient.

17 **d. Daniel Weston**

18 Daniel Weston, who did not appear at the fairness hearing, complains about three aspects of
19 the settlement. First, he mistakenly asserts that the settlement requires that, in order for a class
20 member to recover with respect to a particular offering period, he or she must have “work[ed] for
21 the first and last weeks of the 6-month offering period[.]” (1/23/01 Obj. at 2.) Instead, the
22 settlement provides that class members who were not on assignment at Microsoft at either the
23 beginning or the end of an ESPP period nevertheless can recover with respect to such period
24 provided that he or she had no more than a 28-day break in service between assignments. (S.A.

25 FINDINGS OF FACT AND CONCLUSIONS OF LAW -

¶ 32). For periods during and after 1998, class members can recover with respect to a given offering period notwithstanding a 33-day gap in service. (S.A. ¶ 32.)

Second, Mr. Weston complains about the settlement's requirement that, in order to recover with respect to a given ESPP offering period, a class member must have performed 750 hours of service during such period, claiming that such requirement sets "a higher standard than the terms of the ESPP plan." (1/23/01 Weston Obj. at 4.) As with Mr. Glenn's complaint regarding the settlement's nine-month requirement, the 750-hour provision is intended to serve as a proxy for common law employee status, not as a proxy for the further restrictions of the ESPP. This criterion, too, is similar to the mechanisms that Washington courts have approved in other similar settlements and the Court finds it acceptable.

Mr. Weston's third complaint is that the settlement's one-year holding period assumption "defies any reason or logic" and will prevent him from recovering the "vast sums of money" to which he feels entitled. (*Id.*) The one-year holding period assumption was adopted by Judge Dimmick. It is Microsoft's position, as articulated in its pending motion on damages, that that assumption is more generous than contract-law principles would provide. However, it is reasonable and fair for the parties to rely on Judge Dimmick's Order in fashioning the terms of the settlement. Accordingly, the Court concludes that Mr. Weston's objections do not support a finding that the settlement is unfair.

e. Theodore Heckathorn

Theodore Heckathorn, who did not appear at the fairness hearing, objects to the way in which individual recovery is linked to the ESPP's offering period structure and hypothetical ESPP purchases. (1/25/01 Heckathorn Obj. at 1.) He suggests that individuals who would not have been eligible to purchase shares through the ESPP, even if Microsoft had considered them its employees, should nevertheless recover under the terms of the settlement. Although Mr. Heckathorn is correct

1 that, because the settlement is based on the structure of the ESPP, there may be individuals who
2 receive nothing under the settlement but who performed assignments of longer duration than
3 individuals who will recover under the settlement, that difference flows directly from the terms of
4 the ESPP contract that the class alleges Microsoft breached. Treating class members differently on
5 account of the merits of each member's claim is not only permissible, but required, under Rule
6 23(e). *See, e.g., Torrissi*, 8 F.3d at 1377-78 (approving of disparate treatment of class members that
7 is based on the facts of the case and is not "irrational"). The Court therefore concludes that Mr.
8 Heckathorn's objections do not support a finding that the settlement is unfair.

9 **f. Steve Trescott**

10 Steve Trescott, who did not appear at the fairness hearing, objects to the exclusion from the
11 Settlement Agreement's definition of "Independent Contractor" of individuals who performed
12 services for Microsoft as a corporation, partnership, LLC, or any legal business entity other than an
13 individual or sole proprietorship. (S.A. ¶ 42.) Like the use of the nine-month and 750-hour
14 requirements, the parties used the objective criterion of legal identity as a proxy for the legal status
15 of common law employment. Accordingly, the Court concludes that the settlement's exclusion of
16 individuals who performed services for Microsoft in the form of a corporation, partnership, LLC, or
17 any legal business entity other than an individual or sole proprietorship is a fair and reasonable
18 compromise, and that Mr. Trescott's objections do not support a finding that the settlement is
19 unfair.

20 **g. Deborah Jacroux and Blanc Weber**

21 Deborah Jacroux and Blanc Weber, neither of whom appeared at the fairness hearing, object
22 to the lawsuit itself and this settlement in its entirety because they believe they were treated fairly
23 by Microsoft. These objections do not support a finding that the settlement is unfair.

1 **V. INCENTIVE AWARDS**

2 The terms of the Settlement Agreement provide incentive awards to the class
3 representatives. None of the 2,745 class members who contacted class counsel after the settlement
4 objected to the incentive awards. Four *Hughes* Named Plaintiffs (Steven Fulgham, Rebecca
5 Hughes, Richard Pauli, and Roberta Wilson, collectively the “Fulgham Objectors”) seek a higher
6 incentive award. In addition, the Hatfield Objectors state that they want a further explanation and
7 that the incentive amount is too low, but do not state what the amount should be nor provide any
8 basis why they consider the awards to be too low.

9 Incentive awards are not uncommon in class action litigation where, as here, a common
10 fund has been created for the benefit of the class. Incentive awards compensate named plaintiffs
11 for the services they provided and the risks they incurred during the course of the class action
12 litigation. *In re Southern Ohio Corr. Facility*, 175 F.R.D. 270, 272-76 (S.D. Ohio 1997).
13 Differences in the amount of incentive award that each class representative receives, based upon
14 the role each played in the litigation, are proper. Here, there is a clear distinction between the
15 *Vizcaino* Named Plaintiffs and the *Hughes* Named Plaintiffs both in the duration of the litigation
16 and the services they provided.

17 The *Vizcaino* Named Plaintiffs began preparation for the administrative proceedings in
18 1989 and participated in the administrative proceedings that began in 1990. The *Vizcaino* class
19 action was filed on December 29, 1992, and certified as a class action on July 21, 1993. The
20 *Vizcaino* Named Plaintiffs were each deposed, filed declarations (Doc. 9-16, 76-90, 118-121, 193,
21 207-208, 284-290, 309-313, and 524), and responded to written discovery. The *Vizcaino* case file
22 reflects 724 docket entries in this Court through February 6, 2001, which number does not include
23 the numerous docket entries in the Ninth Court of Appeals or United States Supreme Court
24 proceedings.

1 The *Hughes* class action was filed on November 17, 1998. The *Hughes* case is a putative
2 class action, but no class was certified. The *Hughes* Named Plaintiffs filed declarations in the
3 *Vizcaino* class action prior to filing the *Hughes* complaint. (Doc. 345, 349-351, 353-356, 443,
4 453.) They were not deposed and were not required to respond to written discovery. The *Hughes*
5 case file indicates 82 docket entries in this Court through February 1, 2001, many of which
6 represent duplicative pleadings filed in the *Vizcaino* case file. There have been no appellate
7 proceedings in the *Hughes* case.

8 The Settlement Agreement provides that each *Vizcaino* Named Plaintiff will receive a
9 \$25,000 incentive payment for his or her participation as class representative, which includes
10 participation from 1990 through 2000 in the administrative proceedings, commencement of the
11 lawsuit, discovery matters (including answering interrogatories, producing voluminous personal
12 records, and deposition testimony), preparation of declarations, attendance at meetings, and
13 assisting class counsel (S.A. ¶ 65.) The Settlement Agreement also provides that six of the
14 *Vizcaino* Named Plaintiffs, Donna Vizcaino, Jon Waite, Mark Stout, Elizabeth Spokoiny, Larry
15 Spokoiny, and Thomas Morgan, shall each receive an additional \$40,000 payment for additional
16 work, participation, and time-loss from employment from 1989 and thereafter. (S.A. ¶ 66.)

17 The Settlement Agreement provides that each *Hughes* Named Plaintiff will receive a \$7,500
18 incentive payment for participation as a named plaintiff. (S.A. ¶ 67.) The Settlement Agreement
19 authorizes the Court to modify the incentive payments to the named plaintiffs if such amounts are
20 determined to be unreasonable in the context of the results obtained and the overall settlement.
21 (S.A. ¶ 116.)

22 The Court finds, based upon the standard established in the Settlement Agreement and all of
23 the circumstances, that the incentive awards should not be adjusted. In light of the longer duration
24 of the *Vizcaino* case; the greater involvement of the named plaintiffs in the *Vizcaino* case; the

25 FINDINGS OF FACT AND CONCLUSIONS OF LAW -

1 greater risk involved in the *Vizcaino* litigation than that involved in the *Hughes* case, which was
2 filed after the *Vizcaino* class had succeeded on the ESPP liability issue; and the fact that the
3 *Hughes* putative class was subsumed in the *Vizcaino* class not long after *Hughes* was filed pursuant
4 to the Ninth Circuit's *Vizcaino III* decision, it is appropriate to distinguish the individual incentive
5 awards to the *Vizcaino* Named Plaintiffs from the individual incentive awards to the *Hughes*
6 Named Plaintiffs.

7 The Fulgham Objectors filed an objection requesting that the Court set both the *Vizcaino*
8 and *Hughes* incentive payments at \$25,000. Class counsel took the position that if the awards are
9 increased for these four *Vizcaino* plaintiffs, the awards should be increased for all the *Hughes*
10 plaintiffs. Microsoft opposed any changes. The Fulgham Objectors have not identified any factors
11 that alter the Court's conclusion that the amount of the *Hughes* Named Plaintiffs' incentive awards
12 are fair and not unreasonable and should not be increased.

13 The Court also finds, based upon all of the circumstances, that it is appropriate to
14 distinguish among the individual incentive awards to the *Vizcaino* Named Plaintiffs. Lesley Stuart
15 and Geoffrey Culbert were each converted to recognized "headcount" status at Microsoft in 1990,
16 and received full Microsoft benefits thereafter. In contrast, the other six named *Vizcaino* plaintiffs
17 were never converted to recognized "headcount" status at Microsoft, with the exception of Jon
18 Waite, who was terminated in 1989, but was later a Microsoft "headcount" employee for
19 approximately two and a half years. (Doc. 287.) Based on the record, with respect to the *Vizcaino*
20 Named Plaintiffs, the amount of the incentive awards is fair and not unreasonable.


21 A subset of the Hatfield Objectors assert that the individual payments are "too low" and
22 should not be characterized as "compensation solely 'for additional work, participation, and time
23 loss from employment from 1989 and thereafter.'" (1/25/01 Hatfield Obj. at 14.) They do not
24 suggest alternative amounts of proposed incentive awards, or any other legally relevant basis for

1 such an award, but instead, at the fairness hearing, requested appointment of a special master. As
2 already discussed, the Court finds that the amount of the incentive awards in both cases is fair and
3 not unreasonable in the context of the results obtained and the overall settlement. Accordingly,
4 there is no need to appoint a special master.

5 **VI. CONCLUSION**

6 For the reasons stated, the Court finds that the proposed settlement, as clarified and
7 amended, is fair and reasonable. Accordingly, it is ORDERED that the settlement be, and it
8 hereby is, approved pursuant to Federal Rule of Civil Procedure 23(e), subject to the Court's
9 review and potential modification of the attorney fee award under paragraph 116 of the Settlement
10 Agreement.

11 SO ORDERED this 21st day of March, 2001.

12
13 
14 John C. Coughenour
15 Chief United States District Judge
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ANNEX A

1. Abbasi, Karim A.
2. Albaugh, Karin
3. Anderson, Carol
4. Award, Elizabeth F.
5. Beebe, Russell
6. Bernstein, Margaret
7. Boyington, Marcia S.
8. Brendecke, Jeffrey
9. Brinegar, Wayne F.
10. Burroughs, Kelly
11. Canfield, Miles
12. Carlile, Niccole M.
13. Compton, Marilyn A.
14. Copps, Brian
15. Copps, LaVonne R.
16. Delserone, Alicia
17. Detwiler, Landon Todd
18. Eilers, Shara
19. Faccini, Kathleen
20. Ferrara, Regine
21. Foreman, Isabelle L.
22. Freehafer, Nancy J.
23. Gadiwalla, Shamim
24. Gaines, Robert E.
25. Galbraith, Christine E.
26. Gendron, Robert
27. Gracey, Louie W. III
28. Hall, Christine A.
29. Halliday, Brandon
30. Hanson, Laura
31. Harasimowicz, Kathleen
32. Harnden, Donald J.
33. Henderson, Marilyn E.
34. Hsia, Pamela
35. Hyatt, Darrell E.
36. Idstein, Nancy
37. Innes, Daniel S.
38. Iosua, Alvin
39. Jivakov, Todor
40. Kane, Leslie Diane
41. King, Patricia A.
42. Klimek, Rene M.
43. Krystad, Byron
44. Lutian, John M.
45. Martindell, Richard
46. Mayes, Ben A.
47. Maynard, Tracy
48. McGifford, Kathryn S.
49. McGill, Marilyn
50. Mercer, Anne
51. Miah, Abu
52. Mincin, Kurt
53. Moerer, Briana
54. Moore, Matthew Park
55. Nelson, Emma
56. Niland, Claire
57. O'Hara, Linda
58. Paoletti, Valerie
59. Park, Sonhui
60. Parker, Andrew
61. Pyfer, Lindsay A.
62. Rauch, Lynn
63. Redfern, Kristin E.
64. Reger, Carol S.
65. Rich, Cassandra
66. Rumsey, Jonathan A.
67. San Jule, Todd
68. Saracen, Esther
69. Savage, Patricia J.
70. Schare, Julie M.
71. Schmeller, Dana
72. Schnepf, Brett
73. Sergoyan, Lynda V.
74. Sloan, Mary B.
75. Smith, Amanda J.
76. Stewart, Leslie A.
77. Strom, Sigrid Anne
78. Ulus, Teresa M.
79. Uyeshiro, Debbie
80. van de Erve, James
81. Weber, Blanc
82. Wen, Cheryl L.
83. West, Betsy
84. Wilkerson, Ryan R.
85. Wilks, Allien R.
86. Wilson, Janet R.